

1 FENNEMORE CRAIG, P.C.
Lauren J. Caster (004537)
2 3003 North Central Avenue
Suite 2600
3 Phoenix, Arizona 85012-2913
Telephone: (602) 916-5367
4
5 Attorneys for Appellant
Cyprus Bagdad Copper Corporation
6
7

8 STATE LAND DEPARTMENT OF THE STATE OF ARIZONA
9 BEFORE THE BOARD OF APPEALS

10 IN THE MATTER OF APPEAL OF
APPRaisal OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102152
11 IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
12 80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
13 OF TEN YEARS ON STATE LAND
DESCRIBED AS:

A.B. NO. 997

14 SECTION 17, TOWNSHIP 13 NORTH,
15 RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA
16

17 IN THE MATTER OF APPEAL OF
APPRaisal OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102153
18 IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
19 80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
20 OF TEN YEARS ON STATE LAND
DESCRIBED AS:

A.B. NO. 998

22 SECTION 29, TOWNSHIP 14.5 NORTH,
23 RANGE 8 WEST, YAVAPAI COUNTY,
ARIZONA
24
25
26

1 IN THE MATTER OF APPEAL OF
2 APPRAISAL OF APPLICATION TO
3 PURCHASE GROUNDWATER NO. 21-102154
4 IN THE AMOUNT OF \$85 PER ACRE-FOOT,
5 WITH A MINIMUM ANNUAL REMOVAL OF
6 80 ACRE-FEET FOR A TOTAL MINIMUM
7 ANNUAL ROYALTY OF \$6,800 FOR A TERM
8 OF TEN YEARS ON STATE LAND
9 DESCRIBED AS:

A.B. NO. 999

10 SECTION 1, TOWNSHIP 15 NORTH,
11 RANGE 9 WEST, YAVAPAI COUNTY,
12 ARIZONA

13 IN THE MATTER OF APPEAL OF
14 APPRAISAL OF APPLICATION TO
15 PURCHASE GROUNDWATER NO. 21-102155
16 IN THE AMOUNT OF \$85 PER ACRE-FOOT,
17 WITH A MINIMUM ANNUAL REMOVAL OF
18 80 ACRE-FEET FOR A TOTAL MINIMUM
19 ANNUAL ROYALTY OF \$6,800 FOR A TERM
20 OF TEN YEARS ON STATE LAND
21 DESCRIBED AS:

A.B. NO. 1000

22 SECTION 11, TOWNSHIP 15 NORTH,
23 RANGE 9 WEST, YAVAPAI COUNTY,
24 ARIZONA

25 IN THE MATTER OF APPEAL OF
26 APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102156
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:

A.B. NO. 1001

SECTION 24, TOWNSHIP 15 NORTH,
RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA

APPELLANT: CYPRUS BAGDAD COPPER
CORP.

CYPRUS BAGDAD COPPER
CORPORATION'S COMMENTS
ON BOARD OF APPEALS'
PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF
LAW, AND ORDER FOR
A.B. NOS. 997 THROUGH
1001

25 Cyprus Bagdad Copper Corporation ("Cyprus Bagdad")
26 submits the following suggested additions and modifications to

1 the Board's proposed Findings of Fact, Conclusions of Law, and
2 Order. These additions and modifications are supported by the
3 record.

4 "FINDINGS OF FACT" SECTION

5 Insert the Following Findings of Fact

6 1. The Appellant's Applications to Purchase
7 Groundwater Nos. 21-102152, 21-102154 and 21-102155 are intended
8 to secure the right to purchase groundwater to supplement the
9 municipal water supply of the Town of Bagdad, Arizona.
10 Application No. 21-102153 is intended to secure the right to
11 purchase groundwater to supplement the water supply to a trailer
12 park located approximately four miles north of the Town of
13 Bagdad. Application No. 21-102156 is intended to secure the
14 right to purchase groundwater to supplement the industrial water
15 supply of Appellant's mining operation near the Town of Bagdad.

16 2. None of the wells from which groundwater would be
17 withdrawn pursuant to Appellant's Applications Nos. 21-102152
18 through 21-102156 are located within an Active Management Area.
19 The groundwater to be withdrawn pursuant to these Applications
20 would not be used in an Active Management Area. The relative
21 locations of the wells to each other and to the Town of Bagdad
22 are shown on the Appellant's Exhibit No. 1 submitted prior to the
23 hearing.

24 3. The production capacities of the wells from which
25 water would be withdrawn pursuant to Applications Nos. 21-102153
26 through 21-102156 have declined over time from their initial

1 estimated production capacities. This is believed to be due to
2 the fact that they are drilled into fracture zones in rock
3 formations rather than into large alluvial aquifers. Pumping
4 from these wells normally must be suspended from time to time to
5 allow the fracture zones to recharge with groundwater.

6 4. The average depth of the wells from which
7 groundwater would be withdrawn pursuant to Applications Nos. 21-
8 102153 through 21-102156 is 478 feet. The depth of the well from
9 which groundwater would be withdrawn pursuant to Application No.
10 21-102152 is 473 feet.

11 Renumber Finding of Fact No. 1 as Finding No. 5 and Revise to
12 State:

13 5. The Appellant's Application to Purchase
14 Groundwater No. 21-102152 seeks the right to purchase groundwater
15 from one well located at the Skunk Canyon (also known as "Skunk
16 Wash") well site. That well site is located in Section 17,
17 Township 13 North, Range 9 West.

18 Renumber Finding of Fact No. 2 as Finding No. 6 and Make the
19 Following Revisions:

20 In the second to last line the word "point" should be
21 plural; in the same line delete the words "a lease to withdraw"
22 and insert "the right to purchase a minimum of".

23 Renumber Finding of Fact No. 3 as Finding No. 7.

24 Renumber Finding of Fact No. 4 as Finding No. 8, and Revise as
25 Follows:

26 Insert the words "near Highway 97" after the word

1 "well" in the third line. At the conclusion of this Finding
2 insert: ", (iv) the fact that the point of withdrawal and place
3 of use are outside an Active Management Area, and (v) due to the
4 relative remoteness of this water source from other potential
5 water uses, the lack of market demand for water from this water
6 source."

7 Renumber Finding of Fact No. 5 as Finding No. 9 and Revise to State:

9 8. The Appellant's Application to Purchase
10 Groundwater No. 21-102153 seeks the right to purchase groundwater
11 from two wells located at the Sycamore well site. That well site
12 is located in Section 29, Township 14½ North, Range 8 West.

13 Renumber Finding of Fact No. 6 as Finding No. 10 and Revise as Follows:

15 In the second to last line delete the words "a lease to
16 withdraw" and insert "the right to purchase a minimum of".

17 | Renumber Finding of Fact No. 7 as Finding No. 11.

18 Renumber Finding of Fact No. 8 as Finding No. 12 and Revise as Follows:

At the conclusion of this Finding insert: ", (iii) the fact that the points of withdrawal and place of use are outside an Active Management Area, and (iv) due to the relative remoteness of these water sources from other potential water uses, the lack of market demand for water from these water sources."

1 Renumber Finding of Fact No. 9 as Finding No. 13 and Revise to State:

13. The Appellant's Application to Purchase Groundwater No. 21-102154 seeks the right to purchase groundwater from one well located at the Contreras well site. That well site is located in Section 1, Township 15 North, Range 9 West.

7 Renumber Finding of Fact No. 10 as Finding No. 14 and Revise as Follows:

9 In the last line delete the words "a lease to withdraw"
10 and insert "the right to purchase a minimum of".

11 | Renumber Finding of Fact No. 11 as Finding No. 15.

12 Renumber Finding of Fact No. 12 as Finding No. 16 and Revise as Follows:

At the conclusion of this Finding insert: ", (iii) the fact that the point of withdrawal and place of use are outside an Active Management Area, and (iv) due to the relative remoteness of this water source from other potential water uses, the lack of market demand for water from this water source."

19 Renummer Finding of Fact No. 13 as Finding No. 17 and Revise to State:

21 17. The Appellant's Application to Purchase
22 Groundwater No. 21-102155 seeks the right to purchase groundwater
23 from one well located at the Urie well site. That well site is
24 located in Section 11, Township 15 North, Range 9 West.

1 Renumber Finding of Fact No. 14 as Finding No. 18 and Revise as
2 Follows:

3 In the last line delete the words "a lease to withdraw"
4 and insert "the right to purchase a minimum of".

5 Renumber Finding of Fact No. 15 as Finding No. 19.

6 Renumber Finding of Fact No. 16 as Finding No. 20 and Revise as
7 Follows:

8 At the conclusion of this Finding insert: ", (iii) the
9 fact that the point of withdrawal and place of use are outside an
10 Active Management Area, and (iv) due to the relative remoteness
11 of this water source from other potential water uses, the lack of
12 market demand for water from this water source."

13 Renumber Finding of Fact No. 17 as Finding No. 21 and Revise to
14 State:

15 21. The Appellant's Application to Purchase
16 Groundwater No. 21-102156 seeks the right to purchase groundwater
17 from two wells located at the Warm Springs well site. That well
18 site is located in Section 24, Township 15 North, Range 9 West.
19 Water from these wells is transported by means of a pipeline
20 system that is wholly separate from the system carrying water
21 from wells from which groundwater would be withdrawn under
22 Applications Nos. 21-102153 through 21-102155.

23 Renumber Finding of Fact No. 18 as Finding No. 22 and Revise as
24 Follows:

25 In the second to last line delete the words "points of
26 treatment and" and insert the words "point of"; in the last line

1 delete the words "a lease to withdraw" and insert "the right to
2 purchase a minimum of".

3 Renumber Finding of Fact No. 19 as Finding No. 23.

4 Renumber Finding of Fact No. 20 as Finding No. 24 and Revise as
5 Follows:

6 At the conclusion of this Finding insert: ", (v) the
7 fact that the points of withdrawal and place of use are outside
8 an Active Management Area, and (vi) due to the relative
9 remoteness of these water sources from other potential water
10 uses, the lack of market demand for water from these water
11 sources."

12 Renumber Findings of Fact Nos. 21 through 25 as Findings Nos. 25
13 through 29, Respectively.

14 Renumber Finding of Fact No. 26 as Finding No. 30 and Revise as
15 Follows:

16 Add the following sentence at the conclusion of the
17 Finding: "The Appellant maintained that the remoteness in
18 location of the water sources, including the fact that neither
19 the water sources nor the places of use are located in an Active
20 Management Area, and the resulting diminished demand for the
21 water must be considered in determining the value of the water
22 under each of the Applications."

23 Renumber Finding of Fact No. 27 as Finding No. 31 and Revise as
24 Follows:

25 Add the following sentence at the conclusion of the
26 Finding: "The Appellant maintained that the cost of developing

1 and making use of the groundwater from the well sites mentioned
2 in the Applications must be considered in determining the value
3 of the water because those costs diminished the demand for water
4 from those water sources, thus driving downward the value of the
5 water to prospective buyers."

6 Renumber Finding of Fact No. 28 as Finding No. 32 and Revise to
7 State:

8 32. The parties generally agree that rarely is there
9 more than one bidder for the right to purchase groundwater in
10 auctions conducted by the State Land Department, so there is not
11 a true "market" in groundwater reflected in the transactions
12 cited by the Department. The parties generally agree that the
13 key elements to determine water value are the water's quality,
14 quantity, usage and location.

15 Renumber Finding of Fact No. 29 as Finding No. 33 and Revise to
16 State:

17 33. The Appellant maintained that those prior
18 purchases of groundwater in Active Management Areas that afforded
19 the purchasers the right to withdraw groundwater pursuant to the
20 Department's own Type 2 Grandfathered Groundwater Right as well
21 as the right to purchase the groundwater itself, were of little
22 value as comparable sales for these Applications. Absent the
23 ability to withdraw under the Department's own Type 2 Right, the
24 successful bidder would have had to acquire its own Type 2 Right
25 in order to be able to withdraw groundwater from State Trust
26 Lands in those instances. In the Appellant's view, the ability

1 to rely on the Department's own Type 2 Right undoubtedly
2 conferred a benefit on the purchaser in those transactions. The
3 purchaser under these Applications, in contrast, may withdraw
4 groundwater from State Trust Lands without securing any
5 grandfathered groundwater right or groundwater withdrawal permit
6 of any kind. The Department did not regard this distinction as a
7 relevant factor in determining the market value estimate of
8 groundwater under these Applications. Similarly, the Applicant
9 maintained that the fact that the points of withdrawal and the
10 places of use of the groundwater being purchased under these
11 Applications are outside an Active Management Area makes the
12 groundwater to be purchased pursuant to these Applications worth
13 less than groundwater purchased in transactions involving pumping
14 within an Active Management Area. The Department disagreed.
15 Renumber Finding of Fact No. 30 as Finding No. 34 and Revise as
16 Follows:

17 Add the following sentence at the conclusion of the
18 Finding: "The appraisals for these Applications utilized as the
19 date of value March 31, 1997, however, and no transaction
20 occurring after that date was considered by the Department in
21 reaching the market value estimates for these Applications.
22 Likewise, transactions occurring after March 31, 1997 cannot be
23 relied on to support the reasonableness of the market value
24 estimates as of that date."

25 Renumber Finding of Fact No. 31 as Finding No. 35.
26

1 "DISCUSSION" SECTION

2 Suggested Revisions to "Discussion"

3 Beginning in the second to last line of the first
4 paragraph, delete the words "among the wells" and insert the
5 words "in water quality and water sources".

6 With regard to the second paragraph of this section, it
7 is Cyprus Bagdad's position that the Department, and therefore
8 the Board, could not properly consider transactions postdating
9 March 31, 1997, the date of value under the appraisals for these
10 Applications. First, the author of the Department's appraisals
11 admitted that he did not consider any transactions occurring
12 after that date in selecting a value. Second, post-appraisal
13 evidence is legally irrelevant to establishing value as of the
14 date of appraisal. In State Tax Comm'n v. United Verde Extension
15 Mining Co., 39 Ariz. 136, 141, 4 P.2d 395, 397, rehearing denied,
16 39 Ariz. 331, 6 P.2d 889 (1931), the Arizona Supreme Court
17 stated: "We are of the opinion that the trial court is limited
18 in determining the true value to evidence which was in existence
19 at the time the assessment was made." The reference in the
20 second paragraph of this section to "the Department's 1996-97
21 water sales" and the statement that "the limited Department water
22 sales . . . [were] correctly used as comparables," are overbroad
23 insofar as they sanction consideration of transactions occurring
24 after March 31, 1997. This could be corrected by revising the
25 first sentence of the second paragraph to state that "[t]he
26 dilemma in placing great weight on the water sales identified in

1 the Department's appraisals is " The second sentence of
2 that paragraph should be revised to read that "the limited
3 Department water sales preceding the appraisals' date of value,
4 although correctly "

5 In the last paragraph of the "Discussion" section, the
6 word "met" should be "meet."

7 DATED this 13th day of January, 1998.

8 FENNEMORE CRAIG, P.C.

9
10 By Lauren J. Caster
11 Lauren J. Caster
12 Attorneys for Appellant Cyprus
Bagdad Copper Corporation

13 Copies of the foregoing mailed
14 and sent by facsimile transmission
15 this 13th day of January, 1998,
to:

16 J. Dennis Wells
17 State Land Commissioner
1616 West Adams Street
Phoenix, Arizona 85007

18 Terri M. Skladany
19 Assistant Attorney General
20 Solicitor General & Opinion Section
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926

21 Karen E. Baerst, Esq.
22 Assistant Attorney General
23 Land and Natural Resources Section
State of Arizona
1275 West Washington Street
24 Phoenix, Arizona 85007-2926

25
26 Phyllis J. Warner



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

GRANT WOODS
ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2026

MAIN PHONE: 542-5025
TELECOPIER: 542-4085

January 13, 1998

Tehri Skladany
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007Rebecca Good
Clerk, Board of Appeals
1616 West Adams
Phoenix, Arizona 85007
FAX: 542-2590

RECEIVED LIC

JAN 13 1998

ACTION _____

RE: A.B. Nos. 987-1001

Dear Ms. Skladany and Ms. Good:

The State Land Department's comments in regard to the proposed Findings of Fact, Conclusions of Law and Order ("Order") in the appeal of the Cyprus Bagdad Copper Corporation before the State Land Department Board of Appeals follow. The Land Department appreciates the opportunity to comment on the Proposed Order.

As demonstrated by the testimony and evidence at the hearing, the Land Department does not consider factors specific to the applicant when conducting its appraisals. The reason for this is that water is sold at public auction, and the successful bidder is not yet known at the time of the appraisal. Testimony and evidence regarding the particular circumstances of the applicant was presented at the hearing by the Appellant¹. Proposed Findings of Fact nos. 2, 6, 10, 14 and 18 recite "notable features" recognized by the Department. As some of these facts were testified to by the Appellant, the Land Department suggests revising the introductory phrase of these paragraphs as follows: "Evidence and testimony presented at the hearing recognized several notable features related to the _____ application."

¹Because water is publicly auctioned, the Land Department maintains that these particular circumstances are irrelevant to the appraisal.

January 13, 1998
Terry Skladany/Rebecca Good
Page 2

Regarding Proposed Finding of Fact no. 24, the Land Department's comparable sales included on-lease sales of water in amounts less than 50.3 acre feet. The last sentence of no. 24 should, therefore, be revised to state, "Likewise, the amount of water sold or leased ranged from less than one acre foot to 200,000 acre feet"

In response to Proposed Finding of Fact no. 26, the Land Department believes that the testimony was that it was not able to evaluate the location differences among the wells because there was not sufficient data at the time the appraisal was conducted. The Land Department suggests the following language: "The Department was not able to evaluate the location differences among the wells because there was not sufficient data at the time the appraisal was conducted. The Department concentrated its focus on the value of the water."

In response to Proposed Finding of Fact no. 28, the Department does not agree that the market has been entirely removed as a factor in value. Additionally, the Department does not agree that usage is a key element in determining water value, and believes that Mr. Shaffer identified only quality, quantity and location as the key elements. Accordingly, the Department suggests the following alternative language: "The parties generally agreed that competition to purchase groundwater is rare, resulting in less consideration of the market as a factor in value. The parties further agreed that the key elements to determine water value are the water quality, quantity and location."

Regarding Proposed Finding of Fact no. 30, the Land Department's exhibits reflect two additional water sales. The Department suggests revising no. 30 as follows: "Between December of 1996 and November of 1997, the Department conducted three public auction water sales of water valued and sold at \$85.00 per acre foot and two public auction water sales of water valued and sold at \$90.00 per acre foot."

Regarding the Discussion in the Proposed Order, the Land Department would like to reiterate that it does not agree that usage is a standard to be applied (see above discussion). Accordingly, we suggest deleting the word "usage" from the first sentence on page 9.

JAN-13-1998 10:54

AZ ATTORNEY GENERAL

602 5424385 P.04

January 13, 1998
Terry Skladany/Rebecca Good
Page 3

In conclusion, these comments should not be construed as conceding any issues discussed at the hearing. The Land Department reserves its right to avail itself of any rehearing, review or appeals processes available by law. Thank you again for allowing the opportunity to comment on the Proposed Order.

Sincerely,



Karen E. Baerst
Assistant Attorney General

KEB:rg

cc: Lauren J. Caster, Fennemore Craig

TOTAL P.04